In the Supreme Court of the United States

OCTOBER TERM, 1975

No. 75-1339

RONALD WILSON, PETITIONER

v.

UNITED STATES OF AMERICA

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SIXTH CIRCUIT

BRIEF FOR THE UNITED STATES IN OPPOSITION

OPINIONS BELOW

The order of the court of appeals (Pet. App. 1a-2a) affirming petitioner's conviction is not reported. The opinion of the court of appeals (Pet. App. 3a-5a) reversing the district court's pretrial order suppressing evidence is reported at 491 F.2d 924. The opinion of the district court (Pet. App. 6a-11a) is reported at 60 F.R.D. 55.

JURISDICTION

The judgment of the court of appeals was entered on February 16, 1976. The petition for a writ of certiorari was filed on March 17, 1976. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

QUESTIONS PRESENTED

1. Whether a search pursuant to a warrant was unreasonable because it was carried out six days after the issuance of the warrant.

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2. Whether petitioner's incriminating statements, made shortly after he had been given *Miranda* warnings, were involuntary.

STATEMENT

After a jury trial in the United States District Court for the Eastern District of Michigan, petitioner was convicted of two counts of possession of heroin and cocaine with intent to distribute, in violation of 21 U.S.C. 841(a)(1). He was sentenced to concurrent terms of five years' imprisonment, subject to immediate parole eligibility under 18 U.S.C. 4208(a)(2), and to be followed by concurrent terms of three years' special parole.

Early in the afternoon of May 16, 1972, agents of the Bureau of Narcotics and Dangerous Drugs, accompanied by Detroit police officers, executed a search warrant for petitioner's residence.[1] Agent Gerard Finnegan of the Bureau knocked on the door and announced his presence (Tr. 13). Hearing no response, the officers made a forced entry. They found petitioner standing undressed in a hallway near a rear bedroom (Tr. 14-16). Agent Finnegan told petitioner that the officers (approximately 10 in number) were there to execute a search warrant (Tr. 14). One agent quickly found, on petitioner's nightstand, substances that a field test revealed to be cocaine and heroin. Petitioner was placed under arrest and given *Miranda* warnings (Tr. 24-25). Petitioner acknowledged that he understood his rights (Tr. 64-65).

When petitioner, accompanied by agent Finnegan, arrived in the bedroom, petitioner told the agents that the substances on the nightstand were indeed cocaine

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[1]The search warrant had been issued on May 10, 1972. The affidavit in support of the warrant recited that on March 25, 1972, and May 10, 1972, a reliable informant had personally observed quantities of heroin in the possession of petitioner. Copies of the search warrant and supporting affidavit have been lodged with this Court.

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and heroin (Tr. 92). In response to agent Finnegan's question whether petitioner had other drugs, petitioner told the agents about a small metal box in a closet in the bedroom (Tr. 190). While an agent was unlocking and inspecting the contents of the box, petitioner was allowed to put on a pair of pants (Tr. 197). The metal box contained heroin and cocaine (Tr. 94-97, 218-220).

The search continued. In the basement of the house the officers found a safe, which petitioner voluntarily opened (Tr. 102, 198-199). The safe contained a brown substance, which petitioner said was cocaine that had gone bad (Tr. 201). Petitioner was allowed to return upstairs and get fully dressed (Tr. 202-203). He later signed a statement that he had been advised of his constitutional rights (Tr. 71-72).

Prior to trial, petitioner moved to suppress the evidence seized pursuant to the warrant, asserting that the warrant should have been executed more promptly. The district court granted this motion, and the court of appeals reversed (Pet. App. 3a-5a, 11a-15a). The district court then held a hearing to determine whether the statements petitioner made during the search were voluntary. Concluding that they were, it admitted them in evidence. Petitioner was convicted, and the court of appeals affirmed.

ARGUMENT

1. The question whether the six-day delay between the issuance of the search warrant and its execution was excessive has no continuing significance—or, as the court of appeals put it, "little precedential value" (Pet. App. 5a)—inasmuch as Fed. R. Crim. P. 41(c) has been amended. At the time of the search Rule 41 provided that warrants should be executed "forthwith," but within 10 days. In 1972, it was amended to provide that the warrant shall specify the period of time within which the search must

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be performed, but "not to exceed 10 days." The search here was unquestionably valid under the current rule. And even under the law in force at the time of the search, the delay did not invalidate the search.

The affidavit in support of the warrant recited that a reliable informant had observed narcotics in petitioner's possession at his home on May 10, 1972, the date of the warrant's issuance. At the suppression hearing, agent Finnegan testified that he delayed executing the warrant for two reasons: (1) in order to protect the informant, who was visiting petitioner's residence on a periodic basis and might have been identified if the search had closely followed the observation; and (2) because the informant believed that petitioner was expecting the arrival of a large quantity of narcotics shortly after May 10 (H. Tr. 36-40).[2] On May 15, 1972, the informant advised agent Finnegan that the narcotics had arrived, and the warrant was executed the next day (*id.* at 37).

In these circumstances, the six-day delay between the warrant's issuance and execution was fully justified. Courts of appeals have construed this "forthwith" language of the old Rule to require a search with "reasonable" expedition. See *United States* v. *Bedford*, 519 F.2d 650 (C.A. 3). The concern about delayed execution is, of course, that the information upon which the finding of probable cause is predicated may grow stale during a period of unreasonable delay. Here, the fresh information received on May 15 demonstrates that such concern is inapplicable and that the search was reasonable in this case. See *United States* v. *Rael*, 467 F.2d 333 (C.A. 10); *United States* v. *Harper*, 450 F.2d 1032 (C.A. 5); *United States* v. *Dunnings*, 425 F.2d 836 (C.A. 2), certiorari denied, 397 U.S. 1002; *United States* v. *Nepstead*, 424 F.2d 269 (C.A. 9), certiorari denied, 400 U.S. 848.

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[2]"H. Tr." refers to the transcript of proceedings on petitioner's motion to suppress.

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2. Petitioner made incriminating statements shortly after he had been given *Miranda* warnings and after he had acknowledged that he understood them. His contention (Pet. 5) that these statements were involuntary because made in an "atmosphere of fear and psychological overbearing," and because he failed to make an "affirmative oral or written waiver" of his constitutional rights, is insubstantial.

The district court conducted an extensive hearing on this claim. It ruled that the statements, made in petitioner's own house after *Miranda* warnings and petitioner's affirmative acknowledgment to the officers that he understood his rights (Tr. 64-65), were voluntary. Cf. *Beckwith* v. *United States*, No. 74-1243, decided April 21, 1976. The fact that petitioner was unclothed in the presence of numerous law enforcement officers does not, as a matter of law, require the district court to conclude that the statements were involuntary.[3] Indeed, the record supports a finding that petitioner was "quite cooperative" (Tr. 61). The district court properly considered all of the surrounding circumstances. See *Davis* v. *North Carolina*, 384 U.S. 737. Petitioner simply seeks a re-evaluation of the district court's basically factual conclusions.

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[3]Petitioner's assertion that the statements were involuntary because he did not expressly waive his rights to remain silent and to counsel is without foundation. Although the facts and circumstances surrounding the statements must demonstrate that they were made knowingly, intelligently and voluntarily, an express statement, either orally or in writing, waiving these rights is not essential. See *United States* v. *Hayes*, 385 F.2d 375, 377-378 (C.A. 4).

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CONCLUSION

It is respectfully submitted that the petition for a writ of certiorari should be denied.

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